No. 92-1347

In the Supreme Court of the United States

OCTOBER TERM, 1992

ERWIN RAUTENBERG, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (UNITED STATES OF AMERICA, ET AL., REAL PARTIES IN INTEREST)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

DOUGLAS LETTER
JEFFREY A. CLAIR
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals abused its discretion in denying petitioners' second petition for a writ of mandamus seeking to lift the seal on a protective order that was entered by the district court to limit dissemination of information obtained through civil discovery and protected by the state secrets privilege.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Air-Sea Forwarders, Inc. v. *Air Asia Co.*, 880 F.2d 176 (9th Cir. 1989), cert. denied, 493 U.S. 1058 (1990)	2, 3
Mallard v. *United States District Court*, 490 U.S. 296 (1989)	6, 7
United States v. *Reynolds*, 345 U.S. 1 (1953)	8
Weinberger v. *Catholic Action* 454 U.S. 139 (1981)	8

Constitution and rule:

U.S. Const. Amend. I	9, 10
Fed. R. Civ. P. 54(b)	3

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1347

ERWIN RAUTENBERG, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (UNITED STATES OF AMERICA, ET AL., REAL PARTIES IN INTEREST)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. B1) and the order of the district court (Pet. App. C1-C2) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1) denying the petition for a writ of mandamus was entered on August 26, 1992. A petition for rehearing was denied on October 19, 1992. Pet. App. D1. The petition for a writ of certiorari was filed on January 19, 1993, a Tuesday following a federal holiday. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This is petitioners' second petition for a writ of certiorari seeking review of a protective order that limits the scope of discovery and evidence that may be adduced at trial of a private civil action. The Court denied petitioners' prior petition a year ago. 112 S. Ct. 1704 (1992) (No. 91-1136). The pertinent facts and procedural history of the underlying lawsuit are set forth in greater detail in our brief in opposition (at 2-7) in No. 91-1136 and in *Air-Sea Forwarders, Inc.* v. *Air Asia Co.*, 880 F.2d 176, 179-180 (9th Cir. 1989), cert. denied, 493 U.S. 1058 (1990).

Briefly, plaintiff/petitioner Air-Sea Forwarders, Inc., of which petitioner Rautenberg is president, alleges that in the 1950s, defendant Air Asia Co. arranged for Air-Sea's services as a freight-forwarder and customs broker. Air-Sea further alleges that Air Asia entered into an oral contract in 1956 under which that arrangement could be terminated only for good cause. At that time, Air Asia was secretly owned and controlled by the Central Intelligence Agency. In 1975, however, the CIA sold Air Asia to defendant E-Systems, Inc., a private corporation. In 1981, Air Asia selected another freight forwarder. Air-Sea then brought this suit against E-Systems and Air Asia, alleging wrongful termination of the contract. See 91-1136 Br. in Opp. 2.

Air-Sea sought extensive discovery of the two private defendants and certain matters of interest to the United States. On November 6, 1984, the district court, at the request of defendant E-Systems and the

United States (which is not a party to the underlying lawsuit), entered a protective order limiting the scope of discovery and evidence that could be adduced at trial. The court found that the information E-Systems sought to protect constituted confidential research, development, and commercial information, and that the information was in any event irrelevant to Air-Sea's claims. In addition, the court found that the information of interest to the United States constituted sensitive national security information that would be subject to a formal claim of state secrets privilege and that was protected from disclosure by several statutory provisions. See 91-1136 Br. in Opp. 2.

After a trial on the merits, the jury returned verdicts in favor of Air-Sea in the amounts of $216,151.50 in compensatory damages for breach of contract and $6 million in punitive damages for bad faith denial of the existence of a contract. The district court, however, granted the defendants' motion for judgment n.o.v. on the bad faith claim and for a new trial on the breach of contract claim. 880 F.2d at 181. Air-Sea appealed the judgment n.o.v. to the Ninth Circuit, pursuant to Fed. R. Civ. P. 54(b), but it did not challenge the validity of the protective order. See 880 F.2d at 179 n.1, 192. The Ninth Circuit reversed the judgment n.o.v. and remanded for a new trial. *Id.* at 181-191. The case is still awaiting retrial in the district court.

2. After the case was remanded, petitioners filed a petition for a writ of mandamus in the court of appeals, seeking an order directing the district court

to lift the seal on the protective order. The court of appeals denied relief. 91-1136 Pet. App. C1.

Petitioners then filed a petition for a writ of certiorari seeking review of the court of appeals' denial of mandamus. To preserve the confidentiality of the privileged information in the protective order, the certiorari petition was filed under seal. Thereafter, at the suggestion of the United States, a redacted copy of the certiorari petition was filed on the public record. See 112 S. Ct. 576 (1991). The brief for the United States in opposition and petitioners' reply brief were also initially filed under seal. This Court denied the petition on April 20, 1992. 112 S. Ct. 1704 (*reproduced at* Pet. App. A1-A2). At the same time, the Court lifted the seal on our brief in opposition and petitioners' reply brief, but maintained the seal on the unredacted certiorari petition. *Ibid.*

3. a. On May 20, 1992, petitioners filed a motion in the district court to modify the protective order. Specifically, petitioners requested that the district court: (1) remove all restrictions on access to and disclosure of the protective order; (2) remove all restrictions on disclosure of the interest of the United States government in obtaining the protective order; (3) lift the seal from the order; and (4) order the government to provide them certified copies of the order, as amended. C.A. Emergency Petition for Writ Of Mandamus, Exh. A. On July 23, 1992, the district court denied petitioners' motion, noting that "the disclosure restrictions of the Protective Order do not preclude restatement or other publication of statements or materials (i) in briefs which have been filed before this Court and appellate courts in this case and

which are not under seal and (ii) any other public records." Pet. App. C1-C2.

b. On August 14, 1992, petitioners filed a second petition for a writ of mandamus in the court of appeals, again seeking an order directing the district court to lift the seal on the protective order and to provide petitioners with certified copies of the order. C.A. Emergency Petition for Writ of Mandamus at 3-4; see Pet. 11-12. The court of appeals denied the mandamus petition on August 26, 1992. Pet. App. B1. The court of appeals denied petitioners' petition for rehearing on October 19, 1992, directing in addition that "[t]he Clerk shall accept no further filings in this closed docket." Pet. App. D1.

ARGUMENT

The court of appeals did not abuse its discretion in denying petitioners' second and largely duplicative request for a writ of mandamus to compel unsealing of the protective order entered by the district court to maintain the confidentiality of privileged information. The court of appeals' unpublished, one-sentence order denying mandamus does not conflict with any decision of this Court or any other court of appeals or otherwise warrant review by this Court. In fact, most of the arguments raised by petitioners in the instant certiorari petition were raised by petitioners in their prior petition. That petition was denied, and circumstances have not changed since that time. There accordingly is no reason for a different disposition here.

1. Petitioners' contention (Pet. 13-16) that the protective order violates their due process rights merely rehashes arguments made in their certiorari

petition in No. 91-1136. As we explained more fully in our brief in opposition (at 11-14) on that occasion, petitioners' due process claims furnish no basis for mandamus relief. A writ of mandamus may issue only where there is no other adequate means of obtaining relief. *Mallard* v. *United States District Court*, 490 U.S. 296, 309 (1989). Petitioners, however, chose to forgo a right to challenge the protective order in their prior appeal from the final judgment on their claim of bad faith denial of the existence of a contract. See 91-1136 Br. in Opp. 4-5, 8-10. For that reason alone, the court of appeals was correct in once again denying mandamus.

In addition, a writ of mandamus may issue only where the petitioner demonstrates a "clear and indisputable" right to relief. *Mallard*, 490 U.S. at 309. Petitioners have not done so here. Petitioners' due process claim rests on the assertion that while they are faced with the possibility of contempt sanctions for violating the protective order, they are unable to ascertain what the order requires of them. As we previously explained (see 91-1136 Br. in Opp. 11-14), that assertion is belied by the record. Petitioner Rautenberg read the order with counsel present one day after it was issued. *Id.* at 12. When Rautenberg later maintained that a medical condition had caused him to forget the protective order's requirements, government counsel took additional steps to ensure that he remained adequately apprised of its terms. Specifically, government counsel deposed Rautenberg, requested him to reread the order, and inquired whether he understood its terms. Rautenberg, who was represented by petitioner

Steinberg at the deposition, stated that he understood each pertinent page of the order and that he understood that he could inspect the order again if, at any time in the future, he was unable to recall its terms. *Id.* at 12-13. The protective order is and has been available for inspection by counsel upon reasonable request in the Office of the United States Attorney for the district in which Air-Sea's civil action is pending, and a number of Air-Sea's attorneys, including petitioner Steinberg, have reviewed the order under those procedures. *Id.* at 13.

Moreover, the text of the protective order is unambiguous and affords precise notice of the obligations it imposes upon petitioners. It focuses on preserving the confidentiality of information concerning the existence, nature, and scope of a classified relationship with a particular private party. In fact, Rautenberg stated in his deposition that he understood each of the order's provisions, without any suggestion that it is vague or imprecise. See 91-1136 Br. in Opp. 13-14.

In any event, petitioners' due process objection to a possible contempt citation is entirely speculative, because they have not been cited for contempt. Nor have they shown that they would not have an adequate opportunity to raise any due process claim if contempt proceedings were to be instituted in the future. As we have pointed out above, the existence of an alternative means for raising any due process claim renders mandamus relief inappropriate. See *Mallard*, 490 U.S. at 309.

2. For similar reasons, petitioners' claim (Pet. 17-18) that the protective order abridges their right of

access to the courts furnishes no basis for mandamus relief. As we have explained above—and contrary to petitioners' intimation—counsel may inspect the protective order whenever necessary in preparing for trial. They have not shown that this manner of access is inadequate.

The protective order would not in any event violate petitioners' right of access to the courts. The limitations in the protective order were imposed to preserve the confidentiality of information protected by a validly established privilege for state secrets. See 91-1136 Br. in Opp. 6. This Court has made clear that the proper assertion of the state secrets privilege may warrant even dismissal of a case if the case cannot be resolved without disclosure of information protected by the privilege. See *Weinberger* v. *Catholic Action*, 454 U.S. 139, 146-147 (1981); *United States* v. *Reynolds*, 345 U.S. 1, 7-8 (1953). If dismissal of an entire lawsuit is permissible in such circumstances, then mere limitations on disclosure of a protective order limiting the scope of discovery and evidence that may be adduced at trial are also permissible.

Moreover, petitioners have not shown that an appeal from an adverse final judgment in the civil action would not afford them a fully adequate opportunity to raise any claim that their asserted lack of access to the protective order impermissibly affected their ability to present their case (if we assume, arguendo, that petitioners' failure to object to the protective order on their prior appeal did not constitute a waiver of the claim). Again, given the availability of a subsequent appeal, the court of

appeals was especially justified in denying mandamus relief.

3. Petitioners finally contend (Pet. 18-23) that mandamus relief to make the protective order public is now warranted in light of this Court's orders that allowed the public filing of their redacted certiorari petition in No. 91-1136 and lifted the seal from petitioners' unredacted reply brief and motion to take judicial notice in connection with that petition. 112 S. Ct. 576 (1991); 112 S. Ct. 1704 (1992). The difficulty with that contention is that this Court, in the very same order in which it took the last of the actions on which petitioners rely, *denied* petitioners' certiorari petition. That petition, like the instant one, asked this Court to require that the protective order be made public. Nothing has changed since that time. Because the Court denied certiorari (and thereby left the protective order in place) even though it had made certain filings public, the public nature of those filings furnishes no basis for a different disposition here.

Petitioners' First Amendment claim based on those public filings is without merit in any event. The United States has established that the nature and extent of a confidential relationship between the government and a specified private entity is protected from disclosure by the state secrets privilege. The protective order, by identifying that private entity, itself contains information protected by the privilege, and it was for that reason that the district court imposed limitations on public access to and dissemination of the order.

Petitioners contend that this Court, by lifting the seal on certain filings, has now placed the very same information on the public record, and that the protective order's prohibition on disclosure of the same information therefore violates the First Amendment. The factual predicate for this argument, however, is wrong. The Court did not lift the seal on the protective order. Nor did it lift the seal on the unredacted petition for a writ of certiorari. The materials from which the Court did lift the seal contain no official confirmation by the United States that it currently maintains a confidential relationship with the private entity identified in the protective order. Insofar as it may be reflected in the protective order, that information properly may, consistent with the First Amendment, be protected from public dissemination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

DOUGLAS LETTER
JEFFREY A. CLAIR
Attorneys

APRIL 1993